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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ARKANSAS TERM LIMITS, FRANK GILBERT, AND SPENCER G. PLUMLEY,

Petitioners,

v.

EUGENIA T. DONOVAN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

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REPLY TO BRIEF IN OPPOSITION

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1. Respondent's principal answer to the petition is to say that the "Arkansas Supreme Court's Interpretation of Amendment 9 is . . . Dispositive." Br. Opp. 7. The centerpiece of that answer is this paragraph:

> The Arkansas Supreme Court's interpretation of Amendment 9 as "binding" is fully justified by the text of the Amendment. As the court said, "This intent is clear from the language of the proposed Amendment 9 that the legislators *are hereby instructed* to do as told." App. 17a (emphasis in original). A state legislator who violates those

> instructions is, on the face of it, violating the supreme law of the state and his or her oath to uphold the state constitution, Ark. Const. art. 19, § 20. The state supreme court's interpretation of that constitution is of course dispositive. [citations omitted]

Br. Opp. 8. In addition to being unreflected in the record, respondent's contentions are in error.

First, the suggestion that Amendment 9 conflicts with the oath requirement of the Arkansas constitution was not briefed below, it was not argued below and it most certainly was not resolved below — "dispositive[ly]" or otherwise. The case was argued and decided as one presenting the question of Amendment 9's constitutionality under Article V of the United States Constitution.

Second, the opinion below did not, even in passing, discuss article 19, section 20 of the Arkansas constitution (pertaining to oaths). Indeed, the opinion neither mentions nor even cites that provision. It is mystifying how the Arkansas Supreme Court can be said to have dispositively decided any issue, whether of federal or state law, on the basis of a legal provision that went altogether undiscussed.

Perhaps respondent intended to say that if *this* Court had the opportunity to address the Arkansas constitutional issue of Amendment 9's compatibility with other provisions of the Arkansas Constitution, this Court would have found Amendment 9 incompatible with some such provision. Such a contention would be unavailing for two reasons. First, the

claim was never made below and is not presented for review here.[1] Second, this Court cannot be expected to resolve the heretofore unraised Arkansas constitutional question as an alternative ground for upholding what was a patently (erroneous) Article-V based decision.[2]

Or perhaps respondent's claim is that the decision below is dispositive because it rests on some *factual* finding of "bindingness" that makes it unreviewable by this Court. But the Arkansas court's treatment of the "bindingness" of Amendment 9 was not resolved as a factual question, and respondent offers no citation for any such finding of fact.[3] Moreover, it would simply make no sense to subject ultimate

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1 *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("When issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") This statement holds *a fortiori* for issues of state law.

2 "The process of examining state law is unsatisfactory because it requires us to interpret laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed at length by the parties." *Michigan v. Long*, 463 U.S. 1032, 1039 (1983).

3 Even had it been, there would be no bar to review in this Court. The Arkansas court should not be permitted to (and did not attempt to) insulate a decision going to the heart of Article V from federal constitutional review on the basis of a doubtful finding that Amendment 9 is "factually" binding. Such a determination would call for independent appellate judicial determination of the facts upon which the constitutional claim was resolved. *See, e.g., Bose Corp. v. Consumers Union*, 466 U.S. 485, 510-11 (1984) ("The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law. . . . It reflects a deeply held conviction that judges — and particularly members of this Court — must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.").

resolution of the Article V question presented here to the vagaries of 50 states' law of "factual" bindingness.

Or perhaps respondent's claim is that the question dispositively decided was whether Amendment 9 comports with Amendment 7 of the Arkansas constitution. Indeed, if the decision below had rested on that purely state-law ground, it would have been dispositive and posed a bar to review by this Court. But the decision below was expressly put forth (App. 3a), argued (App. 3a, 5a, 22a), understood (App. 4a), discussed (App. 9a) and decided (App. 23a)[4] as a federal question.[5]

Finally — in direct opposition to respondent's contention — a subsequent opinion of the Supreme Court of Arkansas itself describes the decision below as follows:

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[4] The Arkansas Supreme Court concluded that: "The proposed Amendment 9 is clearly violative of the provision in Article V of the United States Constitution that all amendments to the Constitution must come either from Congress or state legislatures — not from the people. It is an indirect attempt to propose an amendment to the United States Constitution, and as such, violates the narrow, specific grants of authority provided in Article V." App. 23a.

[5] To the extent the Arkansas Supreme Court decided the Arkansas law question of Amendment 9's compatibility with Amendment 7, resolution of that issue was thoroughly intertwined with the Article V question. "Our discussion . . . *necessitates* our review of the powers authorized by Article V of the United States Constitution App. 9a (emphasis added). This Court has jurisdiction over cases arising from state courts where the lower court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977); *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983) (same).

> In [*Donovan v. Priest*], *we held that proposed Amendment 9 was violative of the amendment process provided by Article V of the Constitution* and consequently exceeded the powers reserved to the people in Amendment 7 of the Arkansas Constitution.

Schlaf v. Gilbert, 930 S.W.2d 384 (Ark. 1996) (per curiam) (emphasis added). Even the Arkansas Supreme Court disagrees with respondent.

This Court alone has the power to decide the Article V issue finally and dispositively.[6] Petitioners ask that it do so.

2. Respondent asserts that the decision below is consistent with this Court's decisions in *Hawke v. Smith,* 253 U.S. 221 (1920), and *Leser v. Garnett*, 258 U.S. 130 (1922). Mere "consistency" with prior decisions is, of course, not the issue. The Arkansas Supreme Court found that *Hawke dictated* the result reached below. But *Hawke* held only that the term "legislature" cannot, within the meaning of Article V's ratification clause, mean the people of a state acting in referendum. In *Leser* this Court held that a "state cannot evade Article V by having its legislature carry out the bare formalities of ratification or 'Application' under the specific and legally binding command of a 'direct action by the people.'" But Amendment 9 simply does not subject Arkansas legislators to a "binding command"; or relegate them to performance of "bare formalities"; or call

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[6] "State courts, in appropriate cases . . . are bound to [] interpret the United States Constitution. In so doing, they are not free from the final authority of this Court." *Arizona v. Evans*, 115 S. Ct. 1185, 1190 (1996); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (same).

for "direct action by the people" in the federal amendment process. Respondent's continued reliance on *Hawke* and *Leser* "is obviously misplaced." *Kimble v. Swackhamer*, 439 U.S. 1385, 1387 (1978) (Rehnquist, J., as Circuit Justice).

3. The Supreme Court of Arkansas found an express violation of Article V on the basis of Amendment 9's supposed coercive effect on Arkansas legislators. That decision created a clear split of authority with a Nevada decision finding no Article V problem when popular action "does not impose a limitation on the legislators" and leaves them "to vote for or against [an amendment] or refrain from voting [on it] at all." *Swackhamer v. Kimble*, 584 P.2d 161, 162 (Nev. 1978) (Equal Rights Amendment); and with a California decision upholding "language [that] does not purport to bind Congress or the state legislatures under Article V." *AFL-CIO v. Eu*, 686 P.2d 609, 622 (Cal. 1984) (balanced budget amendment).[7]

The decision is also in plain tension with other state court decisions that found a violation of Article V when the people of a state coerced their legislators in a way that actually impaired their freedom to exercise their Article V powers. *See State v. Waltermire*, 691 P.2d 826, 829 (Mont. 1984) (balanced budget amendment measure invalid because it "would compel the Legislature to reach a specific result

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[7] Indeed the California case, citing a Massachusetts *Opinion of the Justices*, 160 N.E. 439 (Mass. 1928) (advisory) (repeal of prohibition amendment), explicitly recognized the split on this issue, saying that "the Massachusetts and Nevada [*Swackhamer*] cases squarely disagree on the validity of a nonbinding initiative." *Eu*, 686 P.2d at 609. The Arkansas court thus joins Massachusetts and Maine, *see Opinion of the Justices*, 673 A.2d 693 (Me. 1996) (advisory), in direct opposition to Nevada, California, and Alabama, *see In re Opinion of the Justices*, 148 So. 107 (Ala. 1933) (advisory) on the question presented.

under threat of confinement and no pay"); *Eu*, 686 P.2d at 620-622 (action "directly by the people . . . would not conform to Article V" and initiative, by its terms "compel[ling] its legislators to apply for a constitutional convention," violated Article V).[8]

Reacting to this clear split of authority, respondent simply divides the cases at a different longitude. Respondent thereby succeeds only in recasting the question: Is Amendment 9 more like a nonbinding referendum (e.g., advisory plebiscite) leaving legislators free to exercise their Article V powers, or more like the kind of illicit coercion (e.g., deprivation of salary) that encroaches on legislators' Article V powers. This Court's guidance is needed to put that question to rest.

4. Respondent says that Amendment 9 is unfit for resolution by this Court because it was decided in a pre-election procedure and thus "state and federal challenges to the merits . . . could not be brought until after the election." Br. Opp. 18. This is a curious claim.

First, it was respondent who elected to bring a pre-election claim and respondent's attack, although deemed

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[8] At pages 16-17 of the brief, Respondent chides petitioners for "lay[ing] great stress" on an advisory opinion of the Alabama Supreme Court in *In re Opinion of the Justices*, 148 So. 107 (Ala. 1933). Respondent appears to have forgotten on page 16 what it had found useful on page 15, namely, the value of even advisory opinions of state supreme courts on this issue. See Br. Opp. 15 (citing *Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996)). In any event, the Alabama case represents a state court's refusal to find an Article V violation in a setting where the challenged action (requirement that representatives to a constitutional convention pledge to vote for the popular candidate) was more "coercive" than anything in Amendment 9.

"procedural" by the Arkansas Supreme Court, was in substance a direct challenge to Amendment 9 under Article V of the U.S. Constitution. Second, the pre-election posture did not stop the Arkansas Supreme Court from deciding Amendment 9's merits under the U.S. Constitution. Third, the temporal posture of the case (pre- rather than post-election) had no effect on the disposition of the Article V question below: under the Arkansas court's reasoning, the people have no power to place on the ballot an amendment encroaching on Article V and if one should pass, implementation would effect the same encroachment. The pre-election status of the Article V challenge was immaterial to the decision below and is immaterial to the issue's suitability for review by this Court.

Fourth, and as respondent well knows, if this Court should decline to review the Article V question because of its pre-election posture, petitioners will never get the opportunity to defend Amendment 9 at all. If the decision below stands, Amendment 9 will never make it on to the Arkansas ballot, it will never be voted on, it can never pass, and so can never be subject to post-election review. Respondent's "vehicle" problem is really a disguised claim for final, favorable, and summary disposition.

Respondent's further claim that Amendment 9 has other "obvious infirmities" counseling denial of the petition here is wholly speculative. No "other infirmities" were raised below and the suggestion that they exist is utterly without record support. Moreover, a reason that vitiates respondent's "pre-petition posture" argument also applies here. Denial of the petition (and concomitant dissolution of

this Court's stay of the Arkansas court's decision)[9] will ensure that these supposed "infirmities" can and will never be addressed. If the initiative can't get on the ballot, it can't get voted on. If it can't get voted on, it can't win. And if it doesn't win, the supposed "infirmities" will never be litigated. Having succeeded in state court on the Article V question — the only issue respondent chose to pursue — she now seeks to evade review of the only question actually presented on the ground that the case also presents important issues she herself chose not to assert. Petitioner respectfully asks this Court not to let respondent have her cake and eat it too.

Finally, all these hypothetical "infirmities" are immaterial to the Article V issue decided by the Arkansas Supreme Court and submitted for this Court's consideration in the petition. That Article V question is important in its own right. It has arisen in the past in connection with any number of proposed constitutional amendments. It has immediate implications for the term-limits question in the State of Arkansas and at least eight other States.[10] And, of course, its implications extend beyond the term limits question alone — to all popular efforts to spur legislators to begin the federal amendment process.

The petition presents a constitutional issue of the first importance, and it presents that issue squarely and in the

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9 *See Donovan v. Priest*, 117 S. Ct. 380 (1996) ("Should the petition for writ of certiorari be denied, this stay terminates automatically.").

10 On November 5, 1996, substantially similar term limits proposals were passed in eight other states. *See* Amicus Brief of the States of Nebraska, Colorado, South Carolina and South Dakota in Support of Petitioner, No. 96-919, *filed* January 24, 1997.

context of deep differences among state courts of last resort. Only plenary review by this Court can correct the grievous error of the court below, resolve the division in state courts, and dispositively settle this fundamental and recurring Article V question.[11] Conjectural infirmities are no bar to review.

For the reasons stated herein and previously, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[11] In granting the stay requested in Petitioner's Emergency Application, *see Arkansas Term Limits v. Donovan*, 117 S. Ct. 380 (1996), this court necessarily found, on the record then available, that petitioners had shown a likelihood that certiorari would be granted in this case. At the Emergency Application phase, petitioners were required to establish (1) a likelihood of irreparable injury that, assuming the correctness of the applicants' position, would result were a stay not issued; (2) a reasonable probability that the Court will grant certiorari; and (3) a fair prospect that the applicant will ultimately prevail on the merits. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 114 S. Ct. 909, 910 (1994) (Souter, J., as Circuit Justice). Nothing in respondent's Brief in Opposition has undercut petitioner's earlier showing.